No. 17955

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MORRIS JOSEPH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

On April 13, 1961, the Grand Jury for the Southern District of California returned an Indictment charging the appellant Morris Joseph in six counts and his co-defendant Morris Clifford in two counts with violations of the narcotics laws of the United States as proscribed in Title 21, United States Code, Section 174 [C. T. 2-7].[1] The appellant, represented by attorney Harold Cutler, and his co-defendant, who was without counsel, were arraigned in the court of the Honorable Harry C. Westover on April 17, 1961, and, in order that the defendant Clifford might obtain an attorney, all further proceedings were continued to April 24, 1961 [C. T. 8]. On the latter date both the appellant and

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[1]C. T. refers to Clerk's Transcript of Record.

his co-defendant, with their respective attorneys Harold Cutler and Robert Barnett, were present in the court of Judge Westover and entered pleas of Not Guilty to all counts. The case was then transferred to the calendar of the Honorable William C. Mathes for all further proceedings [C. T. 9]. In the afternoon of April 24, 1961, both defendants appeared with their counsel in the courtroom of Judge Mathes; at that time the defendants requested trial by jury and the Court ordered the case set for call of the calendar on May 1, 1961 and trial on May 2, 1961 [C. T. 10]. On May 1, 1961, motions by counsel for both defendants for a continuance were denied and a jury was impaneled [C. T. 11]. On May 2, 1961, the trial of the matter commenced [C. T. 12]. The trial continued on May 3, 1961, and culminated on May 4, 1961, with the return of a verdict of Guilty as to appellant Joseph on all six counts. The co-defendant Clifford was acquitted on one count and convicted on the other [C. T. 13, 14]. At the conclusion of the trial the defendant Clifford was sentenced to the custody of the Attorney General for a period of five years and the appellant Joseph was committed to the custody of the Attorney General for imprisonment for sixty years [C. T. 14]. On May 16, 1961, the appellant's motion for a stay of execution was denied [C. T. 24]. On September 11, 1961, appellant Joseph's motion to modify sentence was denied [C. T. 36].

The jurisdiction of the United States District Court is premised on Section 3231 of Title 18, United States Code. The appellant filed a timely notice of appeal on May 15, 1961, pursuant to Rule 39 of the Federal

Rules of Criminal Procedure [C. T. 23]. The jurisdiction of the Court of Appeals to entertain this matter is set forth in Title 28, United States Code, Sections 1291 and 1294.

II.

STATEMENT OF THE FACTS.

The question involved in this appeal is whether the appellant was denied his Sixth Amendment right to effective representation by counsel when, on the date of plea, the trial court overruled the motion by the appellant's attorney for a continuance and set the case for jury trial one week later. Since an analysis of the appellant's contention necessarily involves an appraisement of the facts; they are set forth below. The actual motions for a continuance and the colloquies which then ensued between court and counsel are set forth after the fact summary.

William Green, who at the times hereinafter related resided in San Francisco, California, was retained by the Federal Bureau of Narcotics as a special employee, *i.e.,* an informant. In seeking to arrange a narcotics purchase the informant, acting in an undercover capacity, contacted Isaac Abney, an old source of supply in the Los Angeles area. Abney indicated that he could obtain heroin for Green and, when queried, replied that his source was Morris Joseph. Green indicated that he would prefer dealing directly with Joseph, and Abney promised that he would seek to effectuate a meeting between Green and Joseph [R. T. 289]. Abney was unable to reach Joseph despite repeated telephone calls and so notified the Government employee [R. T. 290]. However, Green did obtain the appellant's busi-

ness address and made several unsuccessful personal calls to Joseph's barber shop on Adams Boulevard in Los Angeles, California.

In January of 1961 a meeting was effected when the shop manicurist introduced Green as the party for whom Mr. Abney had been calling. After the introduction, Green broached the subject of narcotics purchases but was quieted by Joseph who stated that he did not wish to discuss the subject at that time [R. T. 247]. Green communicated the news of his meeting to the San Francisco office of the Federal Bureau of Narcotics.

In February of 1961 Green met with agents from the Los Angeles and San Francisco offices of the Federal Bureau of Narcotics; this meeting took place at the Colony Motel in Los Angeles [R. T. 52]. From his motel room, Green placed a telephone call to the appellant's barber shop and, following a conversation with Joseph, he drove to the shop. Upon his arrival Green found the shop closed but his knock was answered by Joseph [R. T. 249]. At that time the two men engaged in a conversation relative to the purchase of heroin. A quantity and price having been arrived at, they parted company—ostensibly, because Green had to return to his hotel to obtain the purchase price. It was agreed that they would meet again at 9:00 P.M. that evening at the corner of Pico and Spaulding Boulevards in order that the transaction might be consummated [R. T. 251].

The special employee returned to his motel room and related the status of his arrangements to the agents. The agents then searched Green and his automobile

and, shortly before the appointed hour of the meeting, followed in their vehicles as the informant drove to the prearranged meeting place. The informant arrived at the designated corner at 9:00 P.M. and was seen to wait in his parked car until 9:10 P.M.; at that time the appellant Joseph arrived in his light-colored 1961 Thunderbird convertible [R. T. 54, 251]. The Thunderbird pulled alongside Green's vehicle and Green observed that Joseph was the only occupant. At the appellant's suggestion, Green followed in his car as Joseph drove to 1071 South Genesee—the appellant's residence [R. T. 200]. At that time both men left their vehicles and entered the house at that adddress. Following an introduction to members of the household, Green was led by Joseph to his dressing room [R. T. 252]. At this time the two were alone and Joseph stated that he had access to unlimited sums of heroin and cocaine. Apparently in order to substantiate his statement, the appellant exhibited a loose quantity of the two narcotics to Green [R. T. 253]. The appellant then indicated that he did not have the required quantity of heroin at hand and stated that he desired payment on the spot and, in return, he would contact his "stash," *i.e.*, in the parlance of the narcotics trade a place, normally other than the owner's residence, where the narcotic is maintained or cached, in order that he might supply the purchased heroin. The special employee than gave Joseph $350.00 of Official Government Advance Funds and Joseph promised to call the informant's motel later in the evening [R. T. 254].

The Government employee did return to the motel where he was searched and related what had occurred [R. T. 55]. At 10:45 P.M. Green received a call from

Joseph indicating that the party with whom he had left his supply was not home and could not be expected until after midnight. The appellant then requested Green to call him after midnight at Webster 9-4323 [R. T. 56, 255]. The Webster phone number is the one at the 1071 Genesee address [R. T. 199]. Several calls were made by Green to the number given him by Joseph but none answered [R. T. 58, 59, 255]. Finally, at 8:00 P.M. the following day, February 21, 1961, the special employee did reach the appellant and arrangements were made for Green to call at the Genesee address in order that the delivery might be completed. After a search of the special employee and his automobile, the agents followed in their cars as the special employee drove to meet the appellant on Genesee. At approximately midnight the evening of the 21st Green parked in front of the appellant's house and entered the premises. The appellant met the Government agent within the house and handed him the quantity of heroin upon which counts one and two of the indictment were based. The informant left the residence and met with the agents a short distance from the house and handed them the heroin [R. T. 60, 258].

Subsequent to this purchase the informant and several of the agents returned to the San Francisco Bay area. Following their return the narcotics officers determined that further narcotic "buys" from the appellant were necessary to an investigation relative to Joseph's source. At the instance of the law officers, the special employee on February 27, 1961, placed three monitored calls to WEbster 9-4323 in Los Angeles [R. T. 64, 262]. As a result of these calls, it was agreed by Mr. Joseph and Mr. Green that the former

would supply an additional quantity of heroin to the special employee if he would fly to Los Angeles. The following morning Green and two narcotics officers boarded a flight to Los Angeles. Enroute the special employee was searched, outfitted with a Fargo transmitter and given $900.00 of Government money in order that he might complete the proposed purchase. The plane arrived at Los Angeles International Airport at 9:40 A.M. on the morning of February 28, 1961, and Green called the previously mentioned Webster number as soon as he entered the terminal [R. T. 65, 263]. The appellant Joseph answered the phone, requested Green's number and stated that he would call back momentarily. Joseph did not call as promised and Green placed another call to the Webster number; again Joseph answered and this time requested that Green meet him at the barber shop. Green indicated that this was impossible because of his scheduled return flight to San Francisco; Jospeh then stated that he would drive to the airport [R. T. 71, 266]. One half hour later Joseph in his Thunderbird pulled alongside the walk bordering the air terminal building; at that time the agents observed Green join him in the automobile [R. T. 73, 267]. The car pulled away and entered the thoroughfare adjacent to the air terminal facility. A short distance later Joseph made another turn and returned to the parking area adjacent to the terminal. At this time Joseph brought his car alongside a parked 1951 two-tone Chevrolet in which the defendant Clifford was sitting [R. T. 267]. Joseph then drove ahead and Clifford followed in his car. The two cars turned onto an access road adjacent to the freight terminal and parked within a half block of one another. At

that time Green handed Joseph $830.00 and the latter exited the vehicle and appeared to join the defendant Clifford at his automobile. Joseph returned minutes later and handed Green a package containing the heroin occasioning counts three and four of the indictment [R. T. 74, 269, 311]. Both cars then drove off the access road and Joseph dropped Green off in front of the terminal in order that he might meet his plane. Upon entering the terminal building, Green was immediately joined by the narcotics agents who escorted him to the men's restroom where Green surrendered the package containing the narcotics [R. T. 76].

The last transaction occurred on March 10, 1961. In the morning hours of that day Green joined the narcotics agents at their office in San Francisco and placed several monitored calls to Joseph at the Webster number in Los Angeles [R. T. 78, 274]. As a result of these calls, special employee Green, accompanied by two law enforcement officers, flew to Los Angeles that afternoon. In flight Green was again searched by the officers, outfitted with a transmitting device and given $600.00 with which to purchase the narcotics. This time the plane landed at the Lockheed Airport in Burbank, California, a suburb of Los Angeles [R. T. 79, 276].

Upon entering the air terminal building, Green placed several calls to the Webster telephone number but no one answered. At 6:05 P.M. another call was placed by Green and this time Joseph answered the phone [R. T. 80]. A conversation ensued in which Joseph stated that he would be out in the time it took him to drive from his home to the air facility [R. T. 281].

A seemingly proper period of time lapsed and still Joseph had not appeared at the airport. Green again phoned the Joseph residence and talked with Joseph; at this time the appellant indicated that he had been unable to find his way and requested Green to meet him at the northeast corner of La Cienega and Olympic Boulevards in Los Angeles. Green agreed to the meeting place and was immediately driven by the agents to the assigned corner where a Richfield gas station was located. Green alighted a short distance from the station and, under surveillance, walked to the station. Green arrived at approximately 7:15 P.M. and, not finding the appellant, so indicated this to the agents. An agent joined Green and it was determined that another call would be placed to the Joseph telephone number. The call was placed, Joseph answered and responded that he would join Green at the station immediately [R. T. 83, 282]. The agents and Green then separated and minutes later, as surveillance was maintained, Joseph arrived in his Thunderbird and pulled to the curb to allow Green to enter the vehicle. Green entered and Joseph then circled the rear of the station and entered the east flow of traffic on Olympic Boulevard. Almost immediately Joseph made a lefthand turn onto Schumacher Drive and halted the vehicle in order to allow the waiting defendant Clifford to enter the car [R. T. 87, 131, 283]. After Clifford entered the vehicle, it continued a short distance up the street and turned about to again face Olympic Boulevard. The turn having been completed, Joseph parked the car and proceeded to renegotiate price and quantity with Green. An agreement was reached and Green handed Joseph the money in exchange for the package which Clifford

had brought with him. Joseph started the car and drove again to the Richfield station where Green left the car. Joseph and Clifford then drove off and Green was joined moments later by the surveilling agents to whom Green turned over the package which he had received on Schumacher Drive. An examination of the package's contents revealed the heroin upon which counts four and six of the indictment were premised [R. T. 87, 285].

There were no further transactions and the case terminated with the arrests of Joseph and Clifford some days after the last narcotics purchase.

In his appeal the appellant does not question the aforementioned facts; rather he looks to the amount of time allotted his counsel for preparation and states that it was insufficient—in fact he states that the time was so limited as to deprive him of the effective assistance of counsel. The vehicle for the appeal is the trial court's continued denial of appellant's motions for a continuance.

The facts reveal that the appellant with his defense counsel Harold Cutler appeared on April 17 and 24 of 1961 in the Honorable Harry C. Westover's courtroom in order that he might be arraigned and plead. After entering a plea of not guilty his case was transferred to the calendar of the Honorable William C. Mathes [R. T. 8, 9]. The reporter's transcript then reveals that on April 24, 1961, the appellant ap-

peared with his counsel Harold Cutler in the courtroom of the Honorable William C. Mathes and when the court clerk called the appellant's case for jury trial, Mr. Cutler indicated that the defendant Morris Joseph was "ready" [R. T. 5]. However, when the case was set for call of the calendar on May 1, 1961, and trial on May 2, 1961, attorney Cutler indicated that he was already retained in a state criminal case which was set for trial on May 1, 1961. The Court then stated that "something might happen to that one" and there was no further discussion [R. T. 6, 7].

The following Monday, May 1, 1961, at 1:30 P.M. the appellant Joseph was again present in Judge Mathes' courtroom and was represented by attorney Cutler. When the court stated that the trial was to commence the following day; Cutler indicated that he was already engaged in another court, had had insufficient time to prepare and therefore moved for a continuance. The Court denied counsel's motion [R. T. 9, 10, 11].

Prior to the selection of a jury at 3:30 P.M. on the same date, the Court again denied a motion for a continuance [R. T. 12]. Following completion of the jury selection the trial was recessed until the following day May 2, 1961, at 9:30 A.M.

On May 2, 1961, the trial commenced and at the conclusion of Government counsel's opening argument, the appellant's attorney Mr. Cutler, renewed his motion for a continuance—it was again denied [R. T. 27, 28].

During the course of the trial on May 3, 1961, the court indicated to the jury and counsel its reason for denying the repeated motions for a continuance, *i.e.*, "It didn't suit the calendar of the court to wait awhile." [R. T. 273].

Again on May 3, 1961, at the conclusion of the Government's case in chief, Mr. Cutler repeated his motion for a continuance. It was denied [R. T. 355]. Mr. Cutler reiterated his motion after a short recess and the following colloquy, illuminative of the reasoning of court and counsel, occurred:

> "Mr. Cutler: At this time, we again will move for a continuance upon the grounds that I have previously stated. I have been unable during the course of this trial, since I originally made that motion when we first began the trial, to complete all of the work which I believe is necessary for the defense of this case.
>
> "Your Honor has kept the sessions going late. Monday we got out something like 5:30, and last night it was past 6:30. I apprised the court originally that I had other matters.
>
> "I submit to the court that in a case involving possible penalties that can be dealt in this case, which is as severe or more severe than a capital case, that a week before trial, from the time of entrance of a plea of not guilty, one week is not sufficient time to prepare a defense.
>
> . . .

"The Court: As I say, I have seen so many of these cases, and I would say that in easily nine out of ten of them the defense has put no witnesses, not even the defendant, on the stand. Nothing happens. As soon as the Government, rests, except for some motions, the case is over.

"Now, lawyers come in here—Mr. Osborne obviously didn't want to go to trial, either. I forced him to go to trial. He didn't want to go to trial. You didn't want to go to trial. And I have tried cases for twenty-one years at the Bar, and I saw many times where I didn't want to go to trial for various reasons, and sometimes dozens of reasons.

"As far as the time to prepare the defense in one of these cases is concerned, a week should be more than sufficient, unless there is some special circumstance, because I have never seen one of these cases brought except that the agents oversaw the transaction and testified to overseeing the transaction, or conducted the transaction themselves.

"Mr. Cutler: I don't feel, with all due respect to the court, that an attorney's preparation of his case should be determined by the court's personal experience with respect to a particular type of case.

"The Court: I have to rule upon how much time you need because I daresay that if you had your way about it, and Mr. Joseph and Mr. Clifford had their way about it, this case would never go to trial, if they were at large on bail. I have never seen a defendant yet who was willing to go

to trial unless he happened to be in jail. And it's really remarkable the excuses that can be thought up for not going to trial.

"If you have something you want to do to prepare for your defense and you show me that it has any semblance of anything, I will be glad to listen to it. But just a general showing of not wanting to go to trial—you have had a week to prepare it. If you weren't ready to undertake the case, you had no business accepting a retainer.

"Mr. Cutler: If I may—

"The Court: Now—you may, yes.

"Mr. Cutler: I may say to the court that I accepted the case approximately two weeks prior to the time of the plea—one week prior to the time of the plea of not guilty. Now at that time, as every other attorney, I am sure, we have other matters to take care of. I have spent what little time I had during the week in my spare time making arrangements to take care of these matters so I could be present in court.

"It is my personal opinion that one week in which to prepare a case in which this particular defendant could get possibly 120 years is not sufficient time of preparation. I informed the court of my desire for a continuance. I didn't ask for a long one. I asked for a short one." [Emphasis added; R. T. 363-366].

Based upon the above motions the appellant contends that his conviction should be reversed.

III.
ARGUMENT.

Appellant Was Not Deprived of His Sixth Amendment Right to Effective Assistance of Counsel.

A. A Defendant Has a Constitutional Right to Effective Assistance of Counsel.

The Government does not dispute appellant's contention that that portion of the Sixth Amendment which reads, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.", has been interpreted by our Supreme Court to mean effective assistance. See *Powell v. Alabama* (1932), 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158. The dispute arises in the periphery of this black-letter law. The United States does take issue with the progression of the appellant's argument, namely, that if there has been a motion for a continuance on the claim that counsel does not have sufficient time to prepare, it is error *per se* to set and try a case within a week of the defendant's plea and motion.

B. The Granting of a Continuance Is a Matter of Discretion.

The processes of justice are best served by an orderly procedure in our court system. What may be orderly to the court may be chaotic to an attorney's calendar; this is a fact of every day court life. With the aforementioned principle in mind it can be seen that judges must be given a great latitude in arranging their trial

calendars. It is stated by the United States Supreme Court in the case of *Isaacs v. United States* (1895), 159 U. S. 487, 489, 16 S. Ct. 51, 40 L. Ed. 229:

> "That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question. [Citations omitted.] . . ."

This statement of the Supreme Court has been echoed more recently in the Ninth Circuit cases of: *Torres v. United States* (9th Cir. 1959), 270 F. 2d 252; *Sherman v. United States* (9th Cir. 1957), 241 F. 2d 329; *Williams v. United States* (9th Cir. 1953), 203 F. 2d 85 and *Kramer v. United States* (9th Cir. 1948), 166 F. 2d 515.

C. The Court Did Not Abuse Its Discretion in Denying the Appellant's Motions for a Continuance.

Apparently, the appellant contends that the trial court abused its discretion inasmuch as its denial of the appellant's motion for a continuance deprived him of effective assistance of counsel. The Supreme Court has stated that the ". . . fact, standing alone, that a continuance has been denied does not constitute a denial of the constitutional right to assistance of counsel." *Avery v. Alabama* (1940), 308 U. S. 444, 447; 60 S. Ct. 321, 84 L. Ed. 377. Time to prepare is not determinative as witnessed by the *Avery* case, *supra,* in which the Supreme Court affirmed a death sentence where the attorneys had three days to prepare the defense. See also the Ninth Circuit case of

Spaulding v. United States (9th Cir. 1960), 279 F. 2d 65; in which it was held that one week was ample time in which to prepare a case for trial.

Instead of looking to time alone, the courts appear to have formulated a broader test which is well expressed in *Ray v. United States* (8th Cir. 1952), 197 F. 2d 268 where the court said at page 271:

> "Whether the time allowed counsel for a defendant for preparation for trial is sufficient will depend upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and the pertinent facts, and the availability of material witnesses. . . ."

For other cases on the test to apply see *Baker v. United States* (9th Cir. 1958), 255 F. 2d 619; and *Yodock v. United States* (M.D. Pa., 1951), 97 Fed. Supp. 307.

As a practical matter, this test has received application in this Circuit. In the *Torres* case, *supra,* Judge Barnes felt it necessary to examine the chronology of events. This examination revealed that on August 12th the appointed attorney requested that he be relieved inasmuch as the defendant would not contact him. The court relieved the first attorney and appointed a new one; at the time of appointment the court set the matter, without objection, for trial on August 14th. On the latter date the new attorney moved for a continuance as he had not had adequate time to consult with his client or to prepare the case for trial. The trial court proceeded with the selection of the jury and then continued the trial of the case to August 19th. On Au-

gust 19th the attorney renewed his motion for a continuance but it was denied and the matter proceeded to trial. On August 20th the court continued the case to August 21st and on that date the trial resumed; the defendant did not call any witnesses nor did he take the stand. That same day the jury reached its guilty verdict.

In holding that the trial court had not abused its discretion in refusing to grant further time for preparation the Court said at pages 254, 255:

> "After reciting some of the foregoing facts, counsel for the appellant says: 'There was thus very plainly no fair opportunity to prepare this case for trial by adequate consultation with the client, decent research of the law involved, investigation of the facts and careful preparation of the instructions.' *With this conclusion we cannot agree.*"
>
> . . .
>
> "Further, the situation which faces most trial courts, including the trial judge here, must be considered. To a certain extent, the lack of time for preparation on the part of appellant's counsel was due to the actions of appellant himself. . . . The trial court explained that it had a problem of other cases calendared for trial at the same time or about the same time and had difficulty in fitting them all in with the least inconvenience to all concerned. Finally, there is the important fact that from an examination of the transcript of the trial as a whole, it is apparent that counsel for the appellant (well known nationally to court and coun-

> sel as an able and effective lawyer) conducted himself with his usual considerable skill and energy. His actions showed that he had spent a considerable amount of time on the law of the case, for he had many comments and objections to make, both concerning the introduction of evidence and the instructions given to the jury. These he vigorously pursued before the trial judge. We are of the opinion that all things considered, it cannot fairly nor honestly be said that the appellant was denied effective assistance of counsel simply because the trial judge refused to grant *further* continuances. . . ."

Within this framework of test and application, it appears that the Court did not abuse its discretion in denying the continuance.

Initially, it should be recognized that the Court was quite obviously aware of the problem which is now before this appellate court. The transcript reveals that after listening to a renewed motion for a continuance the Court stated that a mere general claim that there was not enough time in which to prepare the defense was not enough; however, the Court did not preclude a specific showing as witnessed by its statement:

> "If you have something you want to do to prepare for your defense and you show me that it has any semblance of anything, I will be glad to listen to it." [R. T. 365].

Despite this suggestion, if you will prodding, by the Court there was no specific reason stated by appellant's counsel why a continuance should be granted and the

Court recognized this in its closing remarks to the jury when it stated in reference to the motion:

> "They weren't legal reasons but they may have been good personal reasons." [R. T. 467].

Additionally a review of the transcript indicates that the defendants were in custody and as such were entitled to an expeditious trial of their case [C. T. 10-13]. The Trial Court indicated that the condition of its calendar was such that the matter had to be heard as set in order that the rights of the parties would not suffer with the passage of time [R. T. 273].

On April 13, 1961, the Grand Jury returned the indictment in question and within four days the appellant had retained the services of attorney Harold Cutler, as he appeared at the appellant's arraignment on April 17, 1961 [C. T. 2, 8]. Since the trial of this case did not commence until May 2, 1961, the attorney for Mr. Joseph had at least three weeks in which to become conversant with the facts and law in the matter. Also, the attorney had a week's notice that the case would be tried on May 2, 1961 [C. T. 10].

As to the trial itself, there is no indication that an extraordinary amount of time was required for preparation. Neither the application of the laws involved nor the facts in evidence were terribly complicated. Essentially, as discussed previously, there were three supervised "buys" of narcotics within a comparatively short period of time. Other than agents, there were only three witnesses to the purchases, the two defendants and the special employee, and all were present at the trial. Five exhibits were introduced during the

course of the trial and they consisted of the narcotics and their containers. Certainly this case stands in contrast with the typical mail fraud or tax prosecution where an unusually long period of time is required for preparation in view of the lapse of time between transactions, the great number of witnesses and exhibits and the complexity of the law.

A review of the record is often critical in determining whether counsel has had sufficient time in which to prepare for trial. In this case we find a former prosecutor's past experience clearly reflecting itself in the manner in which the appellant's defense was conducted [R. T. 414]. His objections were not only frequent but also well conceived as witnessed by the number of times they were sustained or caused Government counsel to alter his questions or line of inquiry.[3] His familiarity with the facts and law was indicated by his cross-examination of the Government witnesses. Among other things he brought out that the heroin in question had been diluted; the Federal Bureau of Narcotics had conducted a cursory search of the special employee and his automobile prior to the purchases in question; narcotics are often concealed in the body cavities which were not searched; the special employee was not always under observation during the purchases and the special employee was using narcotics at the time of his purchases from the

[3]The observations, requests and objections by Mr. Cutler in behalf of the appellant are found in the Reporter's Transcript on the following pages: 28, 55, 56, 67, 68, 71, 75, 80, 83, 84, 138, 141[2], 148[3], 149, 151, 156, 163, 165, 173, 178, 198, 199, 204, 205, 207, 208, 212, 243, 244, 248, 249, 253, 261, 262, 273, 275, 277, 278, 279, 352 and 355.

appellant. Additionally, counsel was familiar enough with the facts to be discussing a plea with the representatives of the United States a short time prior to trial [R. T. 507].

With all of the above in mind, it must be said that the trial Court did not abuse its discretion as it brought itself well within the test as voiced in this Circuit and others throughout the country.

IV.

CONCLUSION.

On the facts in this record and the law applicable thereto, for the reasons stated herein, the judgment entered against appellant Morris Joseph is free from error and should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

WILLIAM D. KELLER.